IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 24, 2006

STATE OF TENNESSEE v. JOHN WILLIAM MATKIN, III

Appeal from the Circuit Court for Sevier County
No. 9833-III Richard R. Vance, Judge

No. E2005-02701-CCA-R3-CD - Filed January 18, 2007

The defendant, John William Matkin, III, appeals from the Sevier County Circuit Court's revocation of his probationary sentences for his convictions of fourth or greater offense driving under the influence, a Class E felony, violation of the implied consent law, a Class A misdemeanor, and driving on a revoked license, a Class B misdemeanor. The defendant received an effective split confinement sentence of two years, five months and twenty-nine days with 180 days to be served in jail. Shortly after sentencing, the state filed a revocation warrant alleging that the defendant failed to report for his jail service and failed to report a new arrest. Following a hearing, the trial court found that the defendant failed to report to the jail to serve the confinement portion of his sentences and revoked the earlier grant of probation. The defendant appeals, contending that the lower court erred in revoking probation. Upon review, we hold that the defendant's sentences in Counts 1 and 3 are illegal, vacate them, and remand for further proceedings. We affirm the probation revocation in Count 2 but reverse the trial court's order that it did not have jurisdiction to consider a motion to modify the sentence and remand the case for the trial court to rule on the merits of the motion.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part, Vacated in Part, Reversed in Part, Case Remanded

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Edward Cantrell Miller, District Public Defender, for the appellant, John William Matkin, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Johnnie D. Sellars and Steven R. Hawkins, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

A brief chronological history is helpful to understanding the issues presented in this case. The defendant committed the instant offenses on April 18, 2003, for which he was convicted on

August 10, 2004. He was ordered to begin serving his confinement on September 9, 2004, which did not happen, for reasons that are disputed in this case. Sometime before these convictions, the defendant committed a homicide, but he was not arrested until September 22, 2004. The state filed the revocation warrant on November 15, 2004, but it was not heard until November 14, 2005, by which time the defendant had been tried and convicted of voluntary manslaughter for the homicide.

At the revocation hearing, the state presented the testimony of Dina McCullough, a probation officer. Ms. McCullough testified that she was in court on August 10, 2004, the date of the defendant's sentencing, and that the trial court told the defendant to report to the jail on September 9, 2004, to serve the confinement portion of his sentences. McCullough said that she met with the defendant on August 13, 2004, at which time the defendant signed the necessary paperwork with the probation department. She said that she told the defendant to report to the jail on September 9. She testified that another probation officer, Jim Kripling, was assigned to supervise the defendant. McCullough said that she did not discuss with the defendant the possibility that the defendant would be turned away if the jail were full because in her experience the jail did not turn away individuals who reported to serve a felony sentence. McCullough acknowledged that the probation order that the defendant signed did not specify that it was a violation of the defendant's probation to fail to report to jail. She also said that the defendant was arrested for the homicide after the date he was to report to the jail for the instant offenses.

Jim Kripling, a probation officer, testified that he met with the defendant on August 18, 2004. He said that he did not discuss with the defendant the possibility that the defendant would be turned away at the jail and that he had not had the experience of the jail turning away felons who reported to serve their sentences. Kripling said he told the defendant to contact him within forty-eight hours of being released from jail. Kripling said he had no contact with the defendant after August 18, and he was unaware of the defendant contacting anyone else in the probation department after that date.

Kenny Hatcher, a jailer, testified that the defendant was not listed on the jail intake sheet for September 9, 2004. He said he had no personal knowledge whether the defendant had reported on that date other than what was reflected on the intake sheet. Hatcher said that with rare exceptions, the jail takes everyone who reports to serve a felony sentence. He said that the rare exceptions were for things such as medical reasons.

The defendant testified that his mother took him to the jail on September 9, 2004. He said that he was told the jail was full and that he should report back the following Monday. He testified that he was given a piece of paper to sign and that he immediately went to his attorney's office. He said he "believed" he had given the paper to his attorney, but in any event, he did not have it at the hearing. The defendant claimed that he called the jail the following Monday but was told they were full and to call back Thursday. He said he called on Thursday and was told to call again the following Monday. The defendant testified he called the jail four times about serving his sentence before his arrest on September 22 for the homicide charge. He said that when he was arrested for the homicide, he told Officer McCarter that he needed to notify the probation department of his arrest. He said McCarter told him the probation department would know of his arrest.

The defendant's mother, Thais Zelm, testified that she took the defendant to the jail on September 9, 2004. She said that she was waiting for the defendant to come out of the jail to give her his number, but instead he came outside and said the jail was overcrowded and would not take him. She said he had a piece of paper with him. She took him to his attorney's office, but she did not remember whether he spoke with his attorney. She testified that the piece of paper had been in her possession but had been misplaced when she moved.

Attorney Ken Gilleland testified that he had represented the defendant on the cases that were the subject of the revocation. He said that his file did not contain any notations about the defendant visiting his office after being turned away from the jail. However, Gilleland testified that he remembered the incident in question. He said, "I can't recall all the details, but I do remember that he informed me that . . . they would not take him in on a certain day when he was supposed to have reported." Gilleland said he normally would tell an individual to hold on to a piece of paper from the jail, but if he had been given one, he would have placed it in his file. He said he would not have advised the defendant to contact the probation department and he doubted that he would have contacted the probation department himself.

The defendant argued both that the probation violation had not been established and that the state had not been timely in its pursuit of the revocation. The trial court ruled that the state had not denied the defendant's right to speedy trial on the revocation. The trial court expressed doubt about the defendant's testimony, but it accredited the testimony of Attorney Gilleland that he spoke with the defendant about his attempt to report to the jail. The court noted the lack of documentary proof of the defendant's report to the jail, including the absence of a notation in the jail records and the absence at the hearing of the paper the defendant said he had been given at the jail. The court noted the contradictory proof about what had happened to the paper from the jail – the defendant said he gave it to Gilleland, the defendant's mother said she kept it, and Gilleland said he was not given it. The trial court ruled that the state had established by a preponderance of the evidence that the defendant failed to notify his probation officer that the jail was unable to accommodate him, failed to serve his sentence as ordered, and violated his terms of probation. The court ordered that the defendant's original sentences be served in confinement.

Twenty days after entry of the revocation order, the defendant filed a notice of appeal as well as a "Motion to Modify Sentence." The motion for sentence modification was heard on March 27, 2006, at which time the appeal of the revocation order was pending in this court. At the hearing, the defendant's mother testified that she had located the document she had been unable to produce at the revocation hearing. She tendered a document on Sevier County Sheriff's letterhead which was dated September 15, 2004, which was after the defendant's original report-to-jail date of September 9, 2004, and which stated that the defendant "has been to the Sevier County Jail Complex to begin serving time on the charge of DUI. At this time . . . the facility does not have accommodations. The jail count is 283. The [defendant] has been instructed to return at a later date to check on availability at our facility." The document also noted that this was the defendant's second such report to the jail. The document was illegibly signed.

The trial court ruled that it did not have jurisdiction to rule on the merits of the defendant's request for sentence modification. However, it entered an order allowing supplementation of the trial court's record with the transcript of the hearing. The supplement was transmitted to this court as part of the record on appeal. No appeal was filed from the trial court's ruling on the Motion to Modify Sentence.

In his appeal, the defendant claims that the state did not pursue the revocation "at the earliest practicable time" as required by Tennessee Code Annotated section 40-35-311(b). The defendant also argues that the trial court abused its discretion in revoking probation. Finally, the defendant argues that the trial court erred in failing to issue a written statement of the evidence relied upon and the reasons for revoking probation.

I

Before addressing the issues presented by the defendant, we must note an irregularity in two of the sentences contained in the parties' plea agreement and imposed by the trial court. The defendant received a complicated split confinement sentence with jail and probation components, the effective length of which was two years, five months, and twenty-nine days, with the first 180 days to be served in the county jail. The individual sentences were as follows:

> **Count 1 - Felony DUI**
> Two years as Range I offender, 180 days jail followed by probation, concurrent to Count 2, jail time concurrent to Count 3 but probation consecutive to probation in Count 3
>
> **Count 2 - Driving on Revoked License**
> Six months, thirty days of which must be served prior to release on probation, concurrent to Count 1
>
> **Count 3 - Violation of Implied Consent Law**
> Eleven months and twenty-nine days, 180 days to serve followed by probation, concurrent to Count 2, jail time concurrent to Count 1 but probation consecutive to probation in Count 1

The sentences imposed in Counts 1 and 3 are illegal. A sentencing court may not order concurrent service of jail terms with consecutive service of probation. State v. Clark, 67 S.W.3d 73, 79 (Tenn. Crim. App. 2001); State v. Connors, 924 S.W.2d 362, 364 (Tenn. Crim. App. 1996), overruled on other grounds by State v. Troutman, 979 S.W.2d 271 (Tenn. 1998).

Although this matter is an appeal of the probation revocation, not a direct appeal of the sentences imposed, an illegal sentence may be corrected at any time. See, e.g., Moody v. State, 160 S.W.3d 512, 516 (Tenn. 2005); State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978); State v. Joe W. France, No. E2003-01293-CCA-R3-CD, Jefferson County (Tenn. Crim. App. July 19, 2004)

(setting aside illegal sentences in appeal of probation revocation order and remanding for new trial). As such, we are constrained to set aside the illegal sentences in Counts 1 and 3. Those counts must be remanded to the trial court for further proceedings in which the defendant may persist in his guilty pleas and be sentenced to legal sentences that are mutually agreeable to the state and the defense, or he may withdraw his guilty pleas and proceed to trial. See, e.g., Smith v. Lewis, 202 S.W.3d 124, 129 (Tenn. 2006).

II

We now consider the issues presented by the defendant in this appeal. First, the defendant claims that the trial court abused its discretion in revoking probation because the proceedings were unnecessarily delayed. He claims that the trial court should have granted the oral motion to dismiss for violation of speedy trial rights that he made at the revocation hearing.

The defendant is correct that he had a right to be brought to hearing without unnecessary delay on a probation violation warrant. This right is both statutory and constitutional. T.C.A. § 40-35-311(b) (requiring that the trial judge inquire into an allegation of probation violation "at the earliest practicable time"); Allen v. State, 505 S.W.2d 715, 719 (Tenn. 1974) (holding that a defendant in a probation revocation proceeding has a constitutional right to a speedy trial). When considering whether a defendant has been denied his speedy trial rights, we consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant from the delay. State v. Bishop, 493 S.W.2d 81, 83-84 (Tenn. 1973) (citing Barker v. Wingo, 407 U.S. 514 (1972)). A delay which approaches one year triggers inquiry into the second through fourth factors. State v. Simmons, 54 S.W.3d 755, 759 (Tenn. 2001); State v. Utley, 956 S.W.2d 489, 494 (Tenn. 1997). We review de novo a trial court's ruling on a motion to dismiss for violation of speedy trial rights. State v. Hawk, 170 S.W.3d 547, 549 (Tenn. 2005).

In the present case, the violation warrant was issued on November 15, 2004, and the hearing was held on November 14, 2005. While just shy of one year, we believe this delay "approaches" that threshold and requires us to consider the remaining factors. The record reflects that the reason for the delay was that the state desired to pursue the pending homicide charge against the defendant before prosecuting the probation violation. The record does not reflect that the defendant made a demand for speedy trial, and the trial court found that he had not. The defendant speculates in his brief that he "very possibly was prejudiced . . . by the delay due to inability to produce the jail 'turn away form' for overcrowding." The trial court found that the defendant had not shown prejudice from any delay. Upon de novo consideration, we hold that the trial court did not err in denying the defendant's motion to dismiss for violation of his speedy trial rights.

III

The defendant's primary issue is that the trial court abused its discretion in finding him in violation of probation. He argues the evidence at the hearing when supplemented with the "jail turn

away form" demonstrated that he reported to the then-overcrowded jail. He also argues that the trial court erred in finding that he violated a rule of probation because the probation order does not contain a specific rule requiring him to report to jail at a certain time. Furthermore, he argues that revocation cannot be sustained based upon the homicide because that crime took place before he was placed on probation.

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, in State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991), our supreme court stated:

> We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

In the present case, the revocation warrant alleged that the defendant failed to report to serve his jail time and had been charged with second degree murder and had not reported his arrest. The trial court found that the defendant had violated his probation based upon the first ground and made no findings relative to the second ground. Upon consideration, we hold that the trial court did not abuse its discretion in finding that a preponderance of the evidence at the revocation hearing demonstrated that the defendant was subject to probation revocation.

There is conflicting evidence whether the defendant actually reported to the jail on September 9, 2004. The trial court expressed its skepticism of the defendant's evidence that he had actually reported and been turned away from the jail. The court noted the conflicting testimony of the defendant, his mother, and his attorney regarding the whereabouts of the form the defendant claimed he had been given at the jail. The court also noted the evidence that the jail turned away felons who reported to serve their sentences only in extreme circumstances.

Given these facts, we conclude that the evidence does not preponderate against the trial court's finding that the defendant violated the terms of probation. That determination, however, does not end our analysis of the present case.

After the trial court revoked the defendant's probation and the defendant appealed, the defendant filed a timely motion for sentence modification. See Tenn. R. Crim. P. 35(a). The trial court ruled that the defendant's appeal of the revocation order divested it of jurisdiction to act on the merits of the motion. This ruling was in error because a trial court retains jurisdiction to modify a previously imposed sentence even after the defendant has filed a notice of appeal. See id.; State v. Bilbrey, 815 S.W.2d 71, 75 (Tenn. Crim. App. 1991). The trial court should have considered the additional evidence the defendant sought to introduce relative to his alleged attempts to report to serve his jail time, and it should have considered whether this evidence warranted sentencing modification. Because the trial court has not ruled on that issue, and because it is relevant to whether the defendant's sentence on Count 2 should be modified following the revocation order, a remand for consideration on the merits of the motion to modify the sentence is proper.

In so holding, we have considered that a defendant has an appeal as of right from a motion for sentence modification, see Tenn. R. Crim. P. 35(d), and that the defendant in this case did not separately appeal the trial court's denial of his motion. A notice of appeal, however, is not jurisdictional in a criminal case, and we may waive its filing in the interest of justice. Tenn. R. App. P. 4(a). Given that the record of the hearing on the motion has been included in the appellate record and that error is apparent, we have elected to waive filing of a separate notice of appeal.

IV

Finally, we reject the defendant's claim that the trial court erred in failing to make written findings relative to the probation revocation. Although a defendant is entitled to a written statement of the reasons upon which a probation revocation is based, that requirement is satisfied by transcribed oral findings which create a sufficient record to notify the defendant of the reasons for the revocation and allow appellate review of the trial court's decision. State v. Leiderman, 86 S.W.3d 584, 590-91 (Tenn. Crim. App. 2002). The record in this case contains a sufficient transcription of the trial judge's oral findings.

In consideration of the foregoing and the record as a whole, we vacate the defendant's sentences in Counts 1 and 3. We affirm the probation revocation in Count 2, but we reverse the trial court's ruling on the motion to modify the sentence with respect to Count 2. We remand for further proceedings consistent with this opinion.

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JOSEPH M. TIPTON, PRESIDING JUDGE